

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
MUMFORD INDEPENDENT SCHOOL DISTRICT	)	File No. 0004932350
)	
Application For Extension of Time to Construct Educational Broadband Service Station WLX441)	
)	
CHEROKEE ISD	)	File Nos. 0004932353
)	
Application For Extension of Time to Construct Educational Broadband Service Station WLX425)	
)	
AVOYELLES PARISH SCHOOL BOARD	)	File No. 0004932354
)	
Application For Extension of Time to Construct Educational Broadband Service Station WLX757)	
)	
GILES COUNTY BOARD OF EDUCATION	)	File No. 0004933993
)	
Application For Extension of Time to Construct Educational Broadband Service Station WNC209)	
)	
NORWICH UNIVERSITY	)	File Nos. 0004934165-0004934171
)	
Applications For Extension of Time to Construct Educational Broadband Service Station WLX459, WLX480, WLX577, WLX635, WLX721, WLX809, and WLX810)	
)	
BERRY HIGH SCHOOL	)	File No. 0004935945
)	
Application For Extension of Time to Construct Educational Broadband Service Station WNC677)	
)	
HALE COUNTY HIGH SCHOOL	)	File No. 0004935947
)	
Application For Extension of Time to Construct Educational Broadband Service Station WNC603)	
)	
WEST ALABAMA HEALTH SERVICES INC	)	File No. 0004935951
)	
Application For Extension of Time to Construct Educational Broadband Service Station WNC433)	
)	
SWANVILLE PUBLIC SCHOOLS	)	File No. 0004935957

Application For Extension of Time to Construct)	
Educational Broadband Service Station WLX472)	
)	
LAWRENCE COUNTY BOARD OF	)	File No. 0004935959
EDUCATION)	
)	
Application For Extension of Time to Construct)	
Educational Broadband Service Station WNC210)	
)	
HALE COUNTY BOARD OF EDUCATION	)	File No. 0004936205
)	
Application For Extension of Time to Construct)	
Educational Broadband Service Station WNC604)	
)	
WAYNE COUNTY BD OF EDUCATION	)	File No. 0004936215
)	
Application For Extension of Time to Construct)	
Educational Broadband Service Station WNC327)	
)	
WALTONVILLE COMMUNITY UNIT #1	)	File No. 0004944835
)	
Application For Extension of Time to Construct)	
Educational Broadband Service Station WLX711)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: Month 28, 2012

Released: Month 29, 2012

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a series of requests¹ seeking extensions of the November 1, 2011 deadline for Educational Broadband service (“EBS”) licensees. These licensees have failed to show that they acted with the requisite diligence or that their failure to meet the deadline was caused by circumstances beyond their control. We also declare the licenses terminated as of November 1, 2011.

¹ File Nos. 0004932350, 0004932353, 0004932354, 0004933993, 0004934165-0004934171, 0004935947, 0004935951, 0004935957, 0004935959, 0004936205, 0004936215, 0004944835 (collectively, “Extension Applications”). We are considering these applications together because they largely present the same facts and make the same arguments.

II. BACKGROUND

2. On April 27, 2006, the Commission adopted new construction requirements applicable to all BRS and EBS licensees, which were codified at Section 27.14(o) of the Commission's Rules.² Under Section 27.14(o), all BRS and EBS licensees were required to demonstrate substantial service on or before May 1, 2011.³ The Commission defines substantial service as a level of service, which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.⁴ A BRS or EBS licensee may make a showing based on meeting the definition of substantial service or based on meeting one of the general safe harbors provided by the Commission in Section 27.14(o)(1) of the Commission's Rules.⁵ In addition, an EBS licensee may make a showing under the educational "safe harbor" the Commission specifically adopted for EBS licensees in Section 27.14(o)(2) of the Commission's Rules.⁶ Many EBS licensees have demonstrated substantial service by meeting this safe harbor.⁷

3. Except for Hale County Board of Education ("Hale County"), Wayne County Bd of Education ("Wayne County"), and Waltonville Community Unit #1 ("Waltonville"), each of the above-captioned licensees filed timely request for extension of the November 1, 2011 substantial service deadline between October 28, 2011 and November 1, 2011.⁸ Hale County, Wayne County and

² Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-5736 274-310 (2006) (*BRS/EBS Second R&O*).

³ 47 C.F.R. § 27.14(o). See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-5736 ¶¶ 274-310 (2006) (*BRS/EBS Second R&O*).

⁴ 47 C.F.R. § 27.14(o).

⁵ An EBS or a BRS licensee could meet the substantial service requirement by showing that it meets one or more of the following five general safe harbors: that it constructed six permanent links per one million people for licensees providing fixed point-to-point services; that it provided coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services; that it provided service to "rural areas" or areas with limited access to telecommunications services; that it provided specialized or technologically sophisticated service; or that it provided service to niche markets. 47 C.F.R. § 27.14(o)(1).

⁶ Under the educational "safe harbor," an EBS licensee is deemed to be providing substantial service with respect to all channels it holds if: it is using its spectrum (or spectrum to which its educational services are shifted) to provide educational services within its GSA; the services it provides are actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; and the level of service it provides meets or exceeds the minimum usage requirements specified in the Commission's rules. 47 C.F.R. § 27.14(o)(2).

⁷ The Wireless Telecommunications Bureau has accepted over 2,100 substantial service notifications from EBS licensees who complied with the November 1, 2011 deadline.

⁸ See 47 C.F.R. § 1.946(e) (request for extension of time to demonstrate coverage must be filed before expiration of coverage period).

Waltonville filed untimely extension applications on November 2 or November 8, 2011.⁹ Each of the applicants amended their applications on January 27, 2012.¹⁰ The applications are unopposed.

4. Most of the applicants are small, rural schools or school districts.¹¹ Norwich University is a nationally accredited private university serving military and traditional students, both online and at its campus in Northfield, Vermont.¹² West Alabama Health Services, Inc. (“West Alabama”) is a provider of health services in Tuscaloosa, Alabama.¹³ Mumford Independent School District (“Mumford”), Cherokee ISD (“Cherokee”), and Avoyelles Parish School Board (“Avoyelles”) describe themselves as too small to attract the interests of smaller operators but lacking the budget to build facilities on their own.¹⁴ Those entities report that they engaged in negotiations with small commercial operators but that they were unable to reach agreements with those operators.¹⁵ The other applicants report that they had “development agreements” with unnamed commercial operators under which the operators agreed to construct wireless systems for the licensees.¹⁶ The unnamed operator(s) allegedly “never followed through with their commitment to preserve the license for the Licensee,” and the licensees were unable to build out the licenses themselves prior to the deadline.¹⁷

5. Each of the applicants now reports that they have found a partner and have developed a plan for building an educationally focused, wireless broadband system utilizing their licenses.¹⁸ They state that equipment for these systems have been identified, and represent that such equipment will be

⁹ File Nos. 0004936205, 0004936215 (filed Nov. 2, 2011); File No. 0004944835 (filed Nov. 8, 2011). In light of our action, we do not decide whether Hale County, Wayne County, and Waltonville have justified a waiver to allow late filing of their extension applications.

¹⁰ Amendments (filed Jan. 27, 2012). Each of the applicants filed amendments that were substantively identical.

¹¹ File No. 0004932350, Extension and Waiver Request (filed Oct. 28, 2011) (“Mumford Exhibit”) at 1; File No. 0004932353, Extension and Waiver Request (filed Oct. 28, 2011) (“Cherokee Exhibit”) at 1; File No. 0004932354, Extension and Waiver Request (filed Oct. 28, 2011) (“Avoyelles Exhibit”) at 1; File No. 0004933993, Extension and Waiver Request (filed Oct. 31, 2011) (“Giles County Exhibit”) at 1; File No. 0004935945, Extension and Waiver Request (filed Nov. 1, 2011) (“Berry High Exhibit”) at 1; File No. 0004935947, Extension and Waiver Request (filed Nov. 1, 2011) (“Hale County High Exhibit”) at 1; File No. 0004935957, Extension and Waiver Request (filed Nov. 1, 2011) (“Swanville Exhibit”) at 1; File No. 0004935959, Extension and Waiver Request (filed Nov. 1, 2011) (“Lawrence County Exhibit”) at 1; File No. 0004936205, Extension and Waiver Request (filed Nov. 2, 2011) (“Hale County BOE Exhibit”) at 1; File No. 0004936215, Extension and Waiver Request (filed Nov. 2, 2011) (“Wayne County Exhibit”) at 1; File No. 0004944835, Extension and Waiver Request (filed Nov. 8, 2011) (“Waltonville Exhibit”) at 1.

¹² File No. 0004934165, Extension and Waiver Request (filed Oct. 31, 2011) (“Norwich Exhibit”) at 1.

¹³ File No. 0004935951, Extension and Waiver Request (filed Nov. 1, 2011) (“West Alabama Health Exhibit”) at 1.

¹⁴ File No. 0004932350, Extension and Waiver Request (filed Oct. 28, 2011) (“Mumford Exhibit”) at 1; File No. 0004932353, Extension and Waiver Request (filed Oct. 28, 2011) (“Cherokee Exhibit”) at 1; File No. 0004932354, Extension and Waiver Request (filed Oct. 28, 2011) (“Avoyelles Exhibit”) at 1.

¹⁵ Mumford Exhibit at 1; Cherokee Exhibit at 1; Avoyelles Exhibit at 1.

¹⁶ Giles County Exhibit at 1; Norwich Exhibit at 1; Berry High Exhibit at 1; Hale County High Exhibit at 1; West Alabama Health Exhibit at 1; Swanville Exhibit at 1; Lawrence County Exhibit 1; Hale County BOE Exhibit at 1; Wayne County Exhibit at 1; Waltonville Exhibit at 1.

¹⁷ Giles County Exhibit at 1; Norwich Exhibit at 1; Berry High Exhibit at 1; Hale County High Exhibit at 1; West Alabama Health Exhibit at 1; Swanville Exhibit at 1; Lawrence County Exhibit 1; Hale County BOE Exhibit at 1; Wayne County Exhibit at 1; Waltonville Exhibit at 1.

¹⁸ Amendments.

ordered and shipped within days after their extension applications.¹⁹ The applicants represent that the planned systems will provide an extension of their wired Internet service to locations within their campus to provide much-needed broadband to facilities lacking Internet access.²⁰ Each applicant requests an extension until May 1, 2012.²¹

III. DISCUSSION

6. An extension request for a coverage requirement may be granted “if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”²² Section 1.946(e)(2) of the Commission’s Rules specifically precludes us from granting a construction extension request based on a licensee’s failure to obtain financing.²³ The Commission has consistently found that licensee business decisions are not circumstances beyond the licensee’s control and are not the basis for regulatory relief.²⁴ Moreover, the Commission has held that a licensee cannot rely on a third party’s failure to perform as justification for a construction extension.²⁵

7. Viewed under these standards, we conclude that the applicants have not justified an extension of time to construct. To the extent Mumford, Cherokee, and Avoyelles lacked the financial resources to construct their stations, our rules preclude granting an extension under those circumstances.²⁶ Furthermore, those applicants made a voluntary business decision to rely on negotiations with outside parties that were not successful. The other parties cite to a failure to perform by third party providers, but as noted above, such failure is not a basis for an extension. Furthermore, none of the applicants have made any serious attempt to show that they were diligent in pursuing their negotiations or in monitoring their partners.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See, e.g.*, Mumford Exhibit at 3. The other applicants make similar requests.

²² 47 C.F.R. § 1.946(e)(1).

²³ 47 C.F.R. § 1.946(e)(2).

²⁴ *See, e.g.*, Redwood Wireless Minnesota, LLC, *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner’s control); Eldorado Communications LLC, *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); Bristol MAS Partners, *Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); AAT Electronics Corporation, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee’s control); Business Radio Communications Systems, Inc., 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); Texas Two-Way, Inc., 98 FCC 2d 1300 (1984), *aff’d sub nom.*, *Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

²⁵ *See e.g.*, Daniel R. Goodman, Receiver, *Memorandum Opinion and Order*, 10 FCC Rcd 8537, 8548 ¶ 24 (1995) (investor reliance on fraudulent company does not excuse compliance with Commission rules); Kansas City Wireless Partners LLP, *Letter*, 24 FCC Rcd 8625, 8627 (WTB MD 2009); Stephen E. Coran, Esquire, *Letter*, 22 FCC Rcd 1921, 1923 (WTB MD 2007) (reliance on third party for financing does not justify extension).

²⁶ 47 C.F.R. § 1.946(e)(2).

8. We note the promises made by the applicants to promptly order equipment and build wireless broadband systems, but conclude that those promises come too late to support an extension. Applicants argue that an extension will allow them to help meet the goals outlined in the Commission's National Broadband Plan by bringing valuable services to communities that are currently substantially underserved by broadband Internet options.²⁷ They also claim that they are now in a position to use their licenses to further their educational mission.²⁸ In the absence of evidence that the applicants acted diligently prior to the November 1, 2011 deadline, we find that these future promises to act are insufficient. Our rules state that ordering equipment within 90 days after initial license grant will be presumed to constitute diligent action.²⁹ None of the applicants cite any authority for the proposition that promises made after the construction deadline should be considered.

9. We also conclude that the applicants have failed to justify a waiver of the November 1, 2011 substantial service deadline. To be granted a waiver, the applicants must show that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁰ The underlying purpose of the EBS substantial service requirement is to fulfill our statutory duty to "ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services."³¹ Applicants argue that because they are now working promptly to construct facilities, it would frustrate the underlying purpose of the rule to deny an extension.³² They argue that if an extension is denied, the spectrum will lie fallow for years.³³ We reject this argument. EBS licensees timely built out over 2,100 licenses by the November 1, 2011 deadline. In light of the applicants' lack of diligence, we believe granting these extensions would send the wrong signal to those licensees who acted diligently to provide service. Granting these extensions would hinder our ability to strictly enforce construction requirements and meet our statutory duties. We therefore conclude that granting waivers would be inconsistent with the underlying purpose of the EBS substantial service requirement.

10. The applicants have also failed to justify a waiver under the second prong of the waiver standard. Applicants argue that they are entitled to a waiver because they "took reasonable steps necessary to ensure that [they] would be able to demonstrate substantial service before the November 1, 2011 deadline."³⁴ We disagree. The Applicants passively relied on third parties in the hope that the third parties would construct facilities for them. As noted above, such reliance is not a valid basis for an extension. Applicants also contend that it would be "contrary to the public interest to deny the waiver and potentially require the return of the spectrum to the Commission when the Licensee has shown that they

²⁷ See, e.g., Mumford Exhibit at 1.

²⁸ See, e.g., Mumford Exhibit at 1.

²⁹ See 47 C.F.R. § 1.946(e)(2).

³⁰ See 47 C.F.R. § 1.925(b)(3); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

³¹ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, *citing* 47 U.S.C. § 309(j)(4)(B).

³² See, e.g., Mumford Exhibit at 2.

³³ See, e.g., Mumford Exhibit at 2.

³⁴ See, e.g., Mumford Exhibit at 2.

are highly motivated to use their spectrum to bring much-needed broadband services to their unserved, rural community that is utterly lacking in broadband.”³⁵ Initially, we question the applicants’ motivation to provide services when no concrete actions were taken to provide service prior to the November 1, 2011 deadline. Moreover, the applicants ignore the Commission’s countervailing duty, as charged by Congress, to “ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services.” Applicants have also failed to explain why it would be inequitable or unduly burdensome to enforce the substantial service deadline when most EBS licensees, including many licensees in rural areas, were able to meet that deadline.

11. An authorization for an EBS license automatically terminates if the licensee fails to meet construction or coverage requirements.³⁶ In light of our conclusion that grant of these extension applications are not in the public interest, we find that the licenses automatically terminated on November 1, 2011, the date that EBS licensees were required to demonstrate substantial service. We will therefore deny the Extension Applications and Waiver Requests.

IV. CONCLUSION AND ORDERING CLAUSES

12. The applicants have failed to justify an extension of time to meet the substantial service deadline for their stations or to justify a waiver of the November 1, 2011 deadline for establishing substantial service. We therefore deny the Extension Applications and Waiver Requests and declare that the licenses automatically terminated as of November 1, 2011.

13. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.946 of the Commission’s Rules, 47 C.F.R. § 1.946, that the above-captioned extension applications and waiver requests (File Nos. 0004932350, 0004932353, 0004932354, 0004933993, 0004934165-0004934171, 0004935945, 0004935947, 0004935951, 0004935957, 0004935959, 0004936205, and 0004944835) filed between October 28, 2011 and November 7, 2011 ARE DENIED.

14. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission’s Rules, 47 C.F.R. § 1.955(a)(2), that the licenses for Stations WLX441, WLX425, WLX757, WNC209, WLX459, WLX480, WLX577, WLX635, WLX721, WLX809, WLX810, WNC677, WNC603, WNC433, WLX472, WNC210, WNC604, WNC327, and WLX711 ARE DECLARED TERMINATED as of November 1, 2011.

15. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

³⁵ See, e.g., Mumford Exhibit at 2.

³⁶ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).